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IN THE

Supreme Court of the United States

October Term, 1957

No. 102

UNITED STATES OF AMERICA,

Petitioner

v.

C. M. Dow

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, C. M. DOW

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BRIEF FOR RESPONDENT, C. M. DOW

STATEMENT

This case will, perhaps, gain meaning from a chronological chart showing its 15 year progress. A year by year examination of the proceedings shows:

Year	Event
1943	Petition filed and *ex parte* order of possession granted (R. 4, 28). Possession taken and a wartime pipeline built (R. 31, 49).
1944	———
1945	C. M. Dow purchased 617.289 acre tract "subject to the existence of . . . . condemnation proceedings filed by the United States" (R. 56, 57).
1946	Declaration of taking filed and estimated compensation deposited for the first time (R. 17-22). Amended petition filed making C. M. Dow a party defendant (R. 22).

Year	Event
1947	———
1948	Commissioners hearing held and $4,450.00 awarded for Parcel No. 1 "Milby Dow Tract" (R. 37).
1949	Motion to set aside award filed by United States on the ground of absence of former land owners (R. 24). Motion withdrawn (R. 39).
1950	———
1951	———
1952	*Shannon* case (*United States* v. *Shannon*, 342 U.S. 288) decided by this Honorable Court.
1953	———
1954	———
1955	Motion for summary judgment dismissing Dow filed by United States (R. 39).
1956	All former owners of Parcel No. 1 appear and urge that compensation is payable to Dow (R. 51). Summary judgment of dismissal nevertheless entered (R. 48-52). Appeal taken (R. 59). Court of Appeals reverses judgment (R. 68) holding Dow entitled to compensation.
1957	Application for certiorari made by United States (R. 75) and granted by this Honorable Court (R. 75).

The Court of Appeals held that the "taking" by the United States was incomplete when Respondent, Dow, purchased the land in question since the United States had not yet acquired *title* to the property nor had the United States lost the right to abandon possession and reject the property. Accordingly, as expressly provided by the Declaration of Taking Act (46 Stat. 1421, 40 U.S.C. 258a(a)) the claim to compensation had not "vested" in the former owners but,

instead, vested in Dow, who was thus entitled to the just compensation due an owner (R. 67). The opinion of the Court of Appeals is reported in 238 F. 2d 898.

SUMMARY OF ARGUMENT

I.

The court below correctly decided that a claim for compensation for the title to property does not become vested until the condemnor no longer can abandon its taking. Since Petitioner admits, in fact contends, that it is not bound to more than severance or restoration damages by taking possession of property (Brief for Petitioner, 25), the Government did not become bound and the landowner's claim for the loss of title to his land did not vest until after Respondent, C. M. Dow, acquired title to the land in question. This is substantially what is provided by the Declaration of Taking Act, which was followed by the United States in this case in acquiring title.

Under the Constitution, the same result is required. Thus, possession and user of land by a condemnor does not take away the landowner's right to alienate the land until payment is made or secured. Under settled rules a taking under the Constitution may be likened to a contract; the condemnee is not bound unless and until the condemnor is also bound. The point at which this occurs is when just compensation is ascertained and when the condemnor may no longer avoid paying such compensation by abandoning the property.

II.

The judgment of the Court of Appeals does substantial justice and prevents a windfall to the Government in this case. Likewise, there is nothing in the decision below inherently unfair to future litigants or which opens the door

to future evils. The Government has a prompt and adequate remedy if evils should develop, e.g. by the filing of declarations of taking when possession is first taken and thus avoiding manipulations of the value of land between the time of "possession" and "taking." Future condemnees can recover for both use and possession of their property, on the one hand, and the taking of their title, on the other hand, under the decision below. The same result, of just compensation to the person or persons entitled thereto, will accrue in either case and this is all the United States and the citizen are entitled to under the Constitution.

III.

The Anti-Assignment Act has no application to Respondent's claim. The 1945 deed to Respondent, C. M. Dow, was effective under Texas law to carry the title to the entire 617.279 acre tract of land, including Parcel No. 1 in its entirety. The operation of Texas law gives this effect to the deed, not the voluntary act of the parties, and, accordingly, there is no violation of the Anti-Assignment Act (10 Stat. 170, as amended, 31 U.S.C. 203). This act has always been interpreted as not prohibiting assignments by operation of law.

The Anti-Assignment Act should not be used to effect restraints on alienation of property which do not otherwise exist by Texas Law. Texas law properly distinguishes between claims for *damages* to land growing out of condemnation proceedings, on the one hand, which are not conveyed by a deed, and title and other incidents of ownership, on the other hand, which are held to be conveyed by a deed pending condemnation. The policy of the Anti-Assignment Act does not reach conveyances such as the present one. Particularly is this so where the Government admittedly

remained free to abandon its proceeding or limit it after the date of Respondent's deed to the land.

The *Shannon* case is to be distinguished. A claim for damages against the Government was there conveyed by separate assignment, which claim would not pass as an incident to the deed, as in the present case.

Alternatively, the *Shannon* case should be re-examined and no longer followed since the rule there set forth allows a federal statute to thwart local law on a matter reserved to the states — the matter of conveyance of title to lands — and so places an unreasonable restraint on alienation of property. Likewise, in the present case, it may enable the United States to acquire property without compensation being paid to anyone, since the former owners may be barred by the six-year statute of limitations. This has already been urged by the United States. (See: Brief for Petitioner, 20, footnote.)

ARGUMENT

I.

A. The "Taking" was not complete and the claim for compensation did not vest until the United States became committed to take the land. This did not occur until after Respondent acquired the land in question.

At the outset, it may be admitted that there are apparent difficulties following on a holding that a "taking" is not complete when possession is first acquired by a condemnor. Problems of the date of valuation, (*Anderson* v. *United States*, 179 F. 2d. 281 (C.A. 5)), the date from which interest is to run (Cf. *Albrecht* v. *United States*, 329 U.S. 599) are easier solved by calling the date when physical possession is acquired the date of "taking." It is likewise true that one court, when faced with the problem of a transfer of title

following a condemnor's taking possession, expressed the view in a *dictum* that the owner at the time of the taking of possession is the owner entitled to compensation despite the fact that the United States may abandon thereafter. (*23 Tracts of Land* v. *United States*, 177 F. 2d 967 (C.A. 6)). The same court, however, applied an Ohio doctrine of "relation back" to the date of an option later exercised in order to hold a subsequent transferee entitled to the award in that case. Accordingly, that case and the present problem did not reach this Honorable Court.

Respondent, however, would hasten to add that the idea will not hold water that any "easy" solution to the Court's problem is provided by calling the date of possession the *completion* of a "taking." Instead, this "solution" itself raises new problems of a more serious nature because of the requirement of the United States Constitution that title does not pass in condemnation proceedings until *payment* is made or secured to be made. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641; *Hurley* v. *Kincaid*, 285 U.S. 95. ". . . The owner is protected by the rule that title does not pass until compensation has been ascertained and paid." *Danforth* v. *United States*, 308 U.S. 271, 284.

The "embarrassing question" referred to by Mr. Justice Harlan (*Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641, 659) — which would be raised under the Fifth Amendment to the United States Constitution if an Act of Congress allowed the taking of possession without payment to serve also as the passage of title to the condemnor — will not remain exorcised. It is with us in this case, arising *not* under an Act of Congress but under what Petitioner would have this Honorable Court create out of whole cloth — apparently a "Federal Common Law" of condemnation — one in which the landowner becomes bound, but the United States does not; one in which not only the landowner's possession and user of his land are lost upon

the Government's taking possession, but also the only remaining prop of the "bundle of rights" of his ownership (Cf. *United States* v. *General Motors Corporation*, 323 U.S. 373, 378) is also lost — e.g. his right to sell and convey his property.[1] The rule sought by Petitioner would, in effect, deprive landowners of their property *without any provision being made for compensation therefor*, contrary to this Honorable Court's consistent interpretation of the Constitution.

B. A landowner does not lose his right of alienation of the land when the condemnor takes possession or until provision for payment is made.

Where *title* to land is concerned, our Federal Constitution requires the United States to "first pay" or become committed to pay before taking title to the property of a citizen. *Danforth* v. *United States*, 308 U.S. 270; *Hurley* v. *Kincaid*, 285 U.S. 95. Even where the Declaration of Taking Act (40 U.S.C.A. 258 (a)) is followed, only a "defeasible" title is acquired by the filing of a Declaration and deposit and it is only upon entry of the *final* judgment in condemnation proceedings that a citizen loses all title to his land. *Catlin* v. *United States*, 324 U.S. 229, 240, 241.

The consequences which follow the "first pay" requirement of our Constitution are spelled out in the cases arising in State Courts — the vast majority of the state constitutions having the same "first pay" requirement. See cases collected in Annotation: "Conveyance Pending Condemnation", 82 A.L.R. 1063. In such jurisdictions (including Texas) the taking of possession *without provision for pay-*

[1] Perhaps Petitioner would concede that *one* right or privilege of ownership would remain — that of paying taxes. Cf. *United States* v. *999.30 Acres*, 114 F. S. 756 (D.C. N.D.).

ment does not constitute a "taking" within the meaning of the Constitution. A landowner's conveyance when possession alone is taken by the condemnor is uniformly given effect and carries to the purchaser the *title* of his vendor and the right to the award. *Fordyce* v. *Wolfe*, 82 Tex. 239, 18 S.W. 145; *Railway Company* v. *Ruby*, 80 Tex. 172, 15 S.W. 1040; *Obst* v. *Covell*, 93 Minn. 30, 100 N.W. 650; *Price* v. *Engelking*, 58 Ill. App. 547; *Bank of America* v. *Glendale*, Cal. Sup. Ct. 50 P. 2d 1035; *In Re 12th Avenue South*, Wash. Sup. Ct. 132 P. 868; *Hamilton* v. *Big Medicine Drainage District No. 1*, Mo. Sup. Ct. 261, S.W. 940; *Griffith* v. *Drainage District*, Iowa Sup. Ct., 166 N.W. 570; See Annotation — "Conveyance Pending Condemnation", 82 A.L.R. 1063; 2 Nichols "Eminent Domain", (1950 Edition) Sec. 5.21, p. 25.

In *Obst* v. *Covell*, 93 Minn. 30, 100 N.W. 650, 652, the Court held:

> ". . . The person who is such owner *at the time the rights under the condemnation proceedings vest in the railroad company* is entitled thereto . . . 'if the proceedings were not completed, but inchoate, *and the company did not acquire a title to the easement prior to the execution of the deed*, the premises passed to Carli, and he became the owner, and the right to damages was in him, as incident to the ownership.'" (Citing *Carli* v. *Stillwater Ry. Co.*, 16 Minn. 260) (emphasis supplied).

And in *Price* v. *Engelking*, 58 Ill. App. 547, 552, the basic reasoning of these cases is shown as follows:

> "When, therefore, appellants, after judgment, conveyed these premises to Henry Engelking, they conveyed all the rights which they had growing out of the ownership of this property. *If nothing further was done by the city, Henry Engelking would have remained the owner they made him.* As thereafter the city paid into court the amount of the judgment, the administratrix of Henry Engelking is entitled to such

money. It was paid for his land, his title, his possession, not that of appellants.'" (Emphasis supplied.)

C. The continued existence of the right to abandon shows that there is no constitutional "Taking" when possession is acquired.

It is admitted by Petitioner that the United States remained free to abandon the condemnation despite the taking of possession and until long after Respondent acquired title to the property (Brief for Petitioner, 25). *Moody* v. *Wickard*, 136 F. 2d 801 (C. A. D. C.), certiorari denied, 320 U.S. 775; *O'Connor* v. *United States*, 155 F. 2d 425 (C. A. 9).

As shown by these cases, it is because of the requirement of *prior payment* that the taking of possession does not terminate the condemnor's right to abandon or discontinue the proceedings. The rule is that " . . . until taking, the condemnor may discontinue or abandon his effort . . . " *Danforth* v. *United States*, 306 U.S. 270, 284. For a taking of possession to constitute the "*punctum temporis*" of the taking, the taking of possession *must result in a transfer of title* to the condemnor and a vested right to compensation in the vendee — a right which the condemnor can not destroy by abandoning the property. 6 Nichols "Eminent Domain" Sec. 26.42 (1) p. 192, 193 (1950 Edition). This rule is inherent in the holding of this Honorable Court that "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement *or in course of time.*" *United States* v. *Dickenson*, 331 U.S. 745, 748. "Course of time", (e.g. the lapse of a prescriptive period) would be unnecessary if "possession" alone equalled a "taking".

The great delays in the proceedings in this case stem directly from the United States' continuing power to aban-

don. In 1943, 1944 and 1945, the pipeline in question was merely another "wartime" facility which might well be abandoned by the United States when the emergency should cease. The landowner then would rid his land of an unsought servitude; a prospect much more attractive than any compensation. Not until May 31, 1946 did the United States become committed to taking a permanent and perpetual right-of-way. At that date Respondent was the owner. At that date, finally, the taking became complete and the claim vested in the then owner, Dow.

D. At the very least, Respondent acquired by his deed the right to the award for the title thereafter acquired by the United States — even if the right to damages for possession was not conveyed.

The "first pay" jurisdictions provide a solution to the Court's dilemma of choosing the "taking" of possession, on the one hand, or the "taking" of title, on the other hand, as the *"punctum temporis"* of the creation of a claim in the landowner. In *Fordyce v. Wolfe*, 82 Tex. 239, 18 S.W. 145, the Court held that a deed pending condemnation conveyed title to the transferee, including the right to receive the award for the permanent easement condemned, but *did not* convey the right to recover damages for the period of time during which the condemnor held possession before the transfer. The Court held (18 S.W. 145-146):

> "At the time, therefore, when appellee conveyed the land to Measles, the railroad company was a mere trespasser, and appellee's title was unimpaired by its entry upon and use of its right of way. He had, however, right of action against it for such damages as resulted from the trespass. It was clear, we think, that by his warranty deed all his title to the land passed to Measles; and it is equally clear that his right of action to re-

cover the damages for the mere trespass did not pass. For the latter he had a right of action, and it was not affected by his conveyance to his vendee. The measure of his damages was the injury to the land which resulted from the mere construction of the railroad, and compensation for the use of so much of the land as was occupied by the company from the time of the entry until the date of his conveyance to Measles."

* * * * *

"Appellee and appellant Measles are entitled to recover sums which, added together, will equal the amount the appellee would have been entitled to recover had he never conveyed, and no more."

This case has been quoted from at length because (1) the reasoning of Judge Gaines is deemed persuasive (2) it points the way to a solution of a perplexing problem (3) it answers completely the "manipulation" argument of Petitioner (Brief, 38) and (4) this is a Texas condemnation completed under the aegis of the Conformity Acts (40 U.S.C. Sec. 258) which were in effect until the passage of Rule 71-A F. R. C. P. This Texas authority, accordingly, has even greater significance. The same result as in *Fordyce* was reached under Massachusetts law by District Judge Charles E. Wyzanski, Jr., a judge of admitted probity, in *United States* v. *40,379 Square Feet of Land*, 58 F.S. 246 (D.C. Mass.). In that case the Court held the United States liable to pay for use and occupancy upon its taking possession of certain property and until a declaration of taking was filed, when, for the first time, title passed and compensation for the title became due. Massachusetts law was relied on as controlling. Division of an award, of course, is no novelty in federal condemnation, and the division into "possessory" claim, on the one hand, and "reversionary" claim, on the other hand, occurs every time premises held under a lease

are condemned. Cf. *Singer* v. *United States*, 115 F.S. 166 (Ct. Cl.).

E. The declaration of taking act "vests" the landowner's claim at the time title is taken by the condemnor.

It is respectfully submitted that, as a plain matter of statutory interpretation of the Declaration of Taking Act (46 Stat. 1421, 40 U.S.C. 258 (a)), reasonable minds cannot differ as it does not admit of two meanings. In plain language, it "vests" the claim in the landowner by the self-same act of filing and deposit of compensation as it also "vests" title in the condemnor. It states that it is by such filing and deposit that lands " . . . *are thereby taken*" for the use of the United States.

No amount of "psychoanalysis of Congress" (Cf. Justice Jackson, concurring in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 319) will detract from the plain language of this Act. It was followed by the United States in this case. The United States, having picked its authority for the condemnation in this case, should be left to the consequences. One of the consequences should be the duty to pay respondent on his claim for compensation which, under the statute, "vested" in him on May 31, 1946, the date of the filing of the Declaration of Taking (R. 17).

Even if this Honorable Court is unable to see the Declaration of Taking Act as settling the matter, it is submitted that the Act, at the very least, *must* have been written by a Congressional committee steeped in the lore of the "first pay" jurisdictions, and that the intent of Congress was to adopt the view of "first pay" for United States condemnations. In this, the Congress had ample warrant from the pronouncements of this Honorable Court that title in condemnation doesn't pass until payment. *Danforth* v. *United States*, 308 U.S. 271.

II.

The Decision of the Court Below Produces a "Fair Result".

There is a distinct possibility that the government will acquire the land here in question without paying anyone if the judgment of the court below is reversed. As has been suggested by Petitioner, limitations may bar Respondent's vendors. This is a result probably not originally intended by Petitioner or of moment beyond the immediate case. However, in examining, as Petitioner urges (Brief for Petitioner 34-39), the "fairness of the result" it should not be overlooked. As has been pointed out herein, the rule advocated by Petitioner would produce the unfair result where possession has been taken by a condemnor of causing an owner *who is unpaid* to nevertheless lose the last vestige of "title" remaining to him, e.g. the right to sell and alienate the land in question. By whatever name it is called, a "taking" without just compensation would result contrary to the constitution.

Concerning the imagined evils to flow from the decision of the Court below, it may be said that there is available to the United States within its own hands a plain adequate remedy at law — one not depending upon any Court but only upon the action of United States attorneys. If even a remote possibility exists that a separation of "possession" and "taking" will open the door to manipulations increasing the government's liabilities, as urged by Petitioner, the plain adequate remedy is to file a "declaration of taking" concurrently with the taking of possession. If this is done, no possible harm can result. In these circumstances, the picture of a litigant with independent means of self-help appealing nevertheless to a court to create a rule of law

solely to protect him from the indolence of his own servants is one which should not commend itself to the court.

Likewise, under the authorities cited in this brief, prior landowners are entitled to compensation for the Government's use and possession of land, so long as the amount which the Government is required to pay *in toto* is no more than would result had there been no conveyance. *Forbyce v. Wolfe*, 82 Tex. 239, 18 S.W. 145; *United States v. 40.379 Square Feet of Land*, 58 F.S. 246 (D.C. Mass.). Accordingly, there is nothing to the argument that administrative officers will be able to reduce the overall compensation by withholding filing of a declaration of taking. Nothing in the decision of the Court below prevents prior landowners from claiming compensation for the possessory period before they convey. If anything stands in their way, it will be the pleading of the 6 year statute of limitations by Petitioner, which is merely an incident of the long delays in this case and which can have no application to future litigants.

III.

A. Respondent received an assignment of the right to compensation by operation of law as an incident to his deed — an assignment not prohibited by the anti-assignment act.

The Anti-Assignment Act (31 U.S.C. 203) has long been restricted by the Courts to cases presenting specific evils. Examples of assignments *not* within the prohibition of the Act include transfers by operation of law, *Erwin v. United States*, 97 U.S. 392; assignments for the benefit of creditors, *Goodman v. Niblack*, 102 U.S. 556; transfers by judicial order to a judgment creditor, *Price v. Forrest*, 173 U.S. 410; by subrogation, *United States v. American Tobacco Co.*, 166 U.S. 468, and conveyances to partners or stockholders,

Mitchell Canneries v. *United States*, 77 F.S. 498 (Ct. Cl). In the Annotation: "Federal Anti-Assignment Statutes," 12 A.L.R. 2d 461, 465 the author states:

> "Perhaps the so-called 'operation of law' exception could be even more broadly stated to the effect that assignments or transfers *which are incidents of a pre-existing bona fide status or relationship not created for the sole purpose of transferring a claim against the United States are not within the intent of the Anti-Assignment Acts.*"

Perhaps the most analogous transfer to the deed to Respondent in this case is the transfer of a lease which has been held to carry with it, as an incident, and without violating the Anti-Assignment Acts, the assignment of claims for *rent* against the United States. *Freedman's Savings and Trust Co.* v. *Shepherd*, 127 U.S. 494. Likewise, on the same theory of an assignment "by operation of law", claims for infringement of a patent are held to be transferred as incidents to the transfer of the patent without violating these acts. *Thayer* v. *Pressey*, 175 Mass. 225, 56 N.E. 5; *Federal Mfg. & Printing Co.* v. *United States*, 41 Ct. Cl. 318. The reasoning of these cases would clearly uphold the transfer in question here.

In this connection, the reasoning of the rent and patent assignment cases has been applied to carry to an assignee of a lease a claim against the United States based upon an obligation to make repairs to the premises. *Singer* v. *United States*, 115 F. S. 166 (Ct. Cl.). The Court of Claims there faced the problem of the transfer of a pre-existing but "inchoate" claim such as now faces this Honorable Court, so the reasoning of the Court may prove helpful. The Court held, on the question of the applicability of the Anti-Assignment Act (115 F. S. 166, 170):

"We do not agree with the defendant's contention that the statute is applicable. It should be noted at the outset that Mrs. Bickham did not purport to assign a *claim* as such. Only if the transfer of the lease was tantamount to the assignment of a claim was the statute violated. While it is true that all alleged injury to the property occurred prior to plaintiff's purchase of it from Mrs. Bickham, under our construction of the lease agreement defendant's dereliction of duty as to the condition of the premises did not become apparent and complete until the termination of the lease. *Consequently, the claim accrued to plaintiff directly and not by way of assignment.* Manifestly the antiassignment statute has no application under such circumstances. *Viewing the lease in its entirety the conclusion that a cause of action ripened only at the termination of the leasing period is supported by both the language of the instrument and the practical construction thereof by the parties themselves.* (Italics ours.)

The analogy between the "ripening" of a "cause of action" after the transfer in the *Singer* case and the "completion" of a "taking" after the transfer as held by the Court below in the present case seems inescapable and the reasoning is apt to point the way to a like solution here.

B. The Shannon Case distinguished.

The Anti-Assignment Statute was construed in *United States* v. *Shannon*, 342 U.S. 286, to bar recovery by an assignee of a claim for reparations against the government for damages caused to buildings by soldiers of the United States. The assignment was made as a part of a contract of sale on the property in question and was by separate instrument. It did not arise by operation of law as an incident to the deed, but was by express assignment. The majority opinion (5 Judges) recognized the clear distinction between

transfers of claims against the government arising by operation of law and the mere "buying a claim against the government". Mr. Justice Douglas' dissent was placed on the ground that the vendors of the claim could not keep any recovery but would hold it in trust for the vendee. Since all parties at interest were present in the same controversy, he could see no reason to deny recovery to the assignee. The majority thought otherwise.

The distinction between this case and the *Shannon* case is clear. There, by express words, a claim against the government was assigned which was already in existence and was vested in the assignors. By Texas law, such a claim could not pass to a purchaser as a mere incident to his deed. *Fordyce* v. *Wolfe*, 82 Tex. 239, 18 S.W. 145; *Texas Central Ry.* v. *Brown*, 86 S.W. 659 (Tex. Civ. App.). Contrary to *Shannon*, it is the operation of Texas law on Respondent's deed, and not any "procedural contrivance", which is the basis for his claim to the award.

The policy against trafficking in claims against the United States does not require that the Anti-Assignment Acts be extended to prevent Texas deeds being given the effect they would otherwise have by Texas law. If the *Shannon* case does require this result, then the rule of that case should be re-examined and no longer followed. The security of land titles and the operation of conveyancing rules are matters reserved to the individual states, and such rules should not be thwarted by the application of a federal statute.

CONCLUSION

The needs of the United States for prompt acquisition of property for public use for which the government is required to pay only just compensation can be fully met under the holding of the Court below. The pronouncements of this

Honorable Court safeguarding the citizen's title to his property until payment is made or secured have as their necessary corrollary that a conveyance *before* payment passes to a transferee such title, including the right to receive the award. So long as the Government pays no more by reason of this conveyance, it has no cause to complain. The decision of the Court below was right and should be affirmed.

Respectfully submitted,

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